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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND J. RYAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1970. (App. B, *infra*). A petition for rehearing with suggestion for rehearing en banc was denied on July 29, 1970. (App. C, *infra*). On September 2, 1970, in response to the government's motion filed on August 28, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to Sunday, September 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's order denying respondent's motion to quash a federal grand jury subpoena to produce records maintained under his control in a foreign country and directing respondent to apply to the foreign government for permission to produce some of those records was an appealable order.

STATEMENT

On March 5, 1968, a federal grand jury in the Central District of California issued a subpoena duces tecum directing respondent Ryan to produce the books, records, papers and documents of five companies doing business in Kenya, controlled and principally owned by Ryan. He produced those records which he had stored at Palm Springs, California, but filed a motion to quash the subpoena as to the remainder, claiming that he had no control over them, that the subpoena was overly broad, and that compliance would compel him to violate a Kenya law prohibiting the removal from Kenya of corporate "books of account, minute books and lists of members" without the consent of the Registrar of Companies of Kenya.

After a hearing, the district judge found that Ryan had control of the records, papers and documents of some of the companies, doing business as the Mount Kenya Safari Club. It denied the motion to quash as to these records [1] and, on July 25, 1968, ordered Ryan

[1] The evidence at the hearing showed that Ryan and two associates purchased the Mount Kenya Safari Club in 1959. He became an officer and director of this Club. In 1961, he organized Ryan Investment, Inc., and became an officer and director,

to produce them in September of 1968. It made an exception, however, as to the books of account, minutes books and list of members. The order directed Ryan to apply to the Registrar of Companies in Kenya for permission to release these books so that they could be produced; if permission was denied, Ryan was to make the records available to United States government agents in Kenya for inspection and copying there (Appendix D, *infra*). The judge offered to include in his order a government proposal to relieve Ryan of travelling to Kenya to get the records (claimed by Ryan to weigh some 2000 pounds) by sending federal agents there to inspect and copy them. Ryan declined these offers (Tr. July 10, 1968, pp. 76, 110, 118; July 12, 1968, pp. 146, 151; July 25, 1968, pp. 224–225).

Following the district court's determination, and the filing of a notice of appeal, Ryan sought both extraordinary relief in the court of appeals to prohibit enforcement of the district court's order, and a stay of proceedings. After oral argument, the court of appeals denied both the extraordinary relief and a

owing 98% of the stock. Records which these companies filed with the Kenya government and the prior testimony of Ryan's associate showed that Ryan retained *de facto* control of these corporations after March 5, 1968, when the subpoena was served, although he had nominally resigned his directorship. In particular, Ryan's associate testified before the grand jury that Ryan's two partners deferred to him in operation of the Kenya enterprises and that Ryan maintained control of the corporate books sought by the subpoena. It was shown also that Kenya law provides that a director "includes any person occupying the position of director by whatever name called" (Statutes of Kenya, Companies Act, Chapter 486, Part 1(1)).

stay of proceedings (Appendix E, *infra*);[2] the appeal itself, however, remained pending.

Ryan then appeared before the federal jury as ordered, but otherwise refused to comply with the district court's order. He neither produced the required records not subject to Kenya law, nor made any application to Kenya authorities for release of the matters protected from removal by Kenya law, nor permitted government agents to examine any records in Kenya. The district court issued an order requiring Ryan to show cause why he should not be held in civil contempt for this conduct. In connection with this proceeding, the court allowed Ryan to issue letters rogatory to two witnesses in Kenya claimed to be necessary to his defense. When the grand jury term expired, this show cause order was converted into an order to show cause why Ryan should not be punished for criminal contempt. The court of appeals, however, stayed the criminal contempt charge pending the appeal from the district court's action on the subpoena, and also stayed Ryan's trial on a charge of obstructing justice (18 U.S.C. 1503) by falsification of certain records which Ryan had initially produced in response to the subpoena duces tecum.[3]

It was not until May 19, 1970, that the court of appeals finally rendered its decision "reversing" the district court's order of July 25, 1968. Although the effect of the district court's order had been to relieve Ryan of some of the burdens of the subpoena itself,

[2] Ryan applied to the Circuit Justice, who also refused to stay the proceedings.

[3] Subsequest to the court of appeals' decision in this case, Ryan was tried and convicted on the obstruction charge.

the court of appeals held that, since it directed affirmative action in Kenya as to some of the records, it "did more than deny a motion to quash; it in effect granted a mandatory injunction which, given full effect, would require action by officials of the Kenyan government." (Appendix A, *infra*, p. 14). Because it was able to characterize that part of the district court's order as an injunction, the court concluded that the whole was appealable as an injunction under 28 U.S.C. 1292(a)(1). Treated as an injunction, the court found that the order was defective in not stating with sufficient particularity what Ryan was expected to do. It also found the order oppressive and overbroad and said that the need for a subpoena could have been obviated by use of letters rogatory.[4]

REASONS FOR GRANTING THE WRIT

The decision below is a substantial departure from the principle of *Cobbledick* v. *United States*, 309 U.S. 323, that, because grand jury investigations are part of the criminal judicial process,[5] district court orders denying motions to quash grand jury subpoenas may not be appealed. Both in terms of the time taken for appeal and the attendant disruption of judicial process, this case exemplifies this Court's observation in *Cobbledick* that "encouragement of delay is fatal to

[4] The court's statement in its opinion that "letters rogatory are now being pursued by the Government" is incorrect and apparently resulted from a misunderstanding of something said during the oral argument. The only letters rogatory relating to the present case are those of respondent Ryan.

[5] See Douglas, J., dissenting in *Hannah* v. *Larche*, 363 U.S. 420, 497–499, for a summary of the role of the grand jury in the American system of justice.

the vindication of the criminal law." 309 U.S. at 325. And the decision below is in square conflict with the refusal of the United States Court of Appeals for the Second Circuit to entertain appeals from functionally identical district court orders auxiliary to grand jury subpoenas.

1. Had the district court simply refused to quash the subpoena in this case, Ryan would have been required to produce all the stated matter in California on the return date, subject to the sanctions of contempt if he failed to do so. That action would not have been appealable.

> * * * The Constitution itself makes the grand jury a part of the judicial process. * * * The proceeding before a grand jury constitutes "a judicial inquiry" * * * of the most ancient lineage. * * * The duration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the "orderly progress" of investigation should no more be encouraged in one case than in the other. That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue. The witness' relation to the inquiry is no different in a grand jury proceeding than [in a criminal trial]. Whatever right he may have requires no further protection in either case than that afforded by the district court until the witness chooses to disobey and is committed for contempt. * * * At that point

> the witness' situation becomes so severed from the main proceeding as to permit an appeal. * * *.

Cobbledick, supra, 309 U.S. at 327–328; see also *Di-Bella* v. *United States,* 369 U.S. 121, 124; *Will* v. *United States,* 389 U.S. 90, 96.

Nothing the district court did here "so severed [Ryan's situation] from the main proceeding as to permit an appeal." Its order, limited to material the grand jury subpoena had required Ryan to produce, simply carried the subpoena forward as to that material not protected by Kenya law;[6] as to the rest, it merely specified a procedure which would permit transmittal to occur in Kenya if permission to remove it could not be obtained. Thus, the specified procedure was fully within the purview of the grand jury's subpoena, and strictly in aid of it.

It is inherent in any subpoena duces tecum that the person required to produce the records take affirmative steps to assure their production. Thus, there is no special significance in the simple fact that the records here sought by the grand jury were maintained outside the United States. Nor does the fact that the judge ordered the respondent to apply to the government of Kenya for permission to remove some of the records change the essential nature of the order—even as to them—as one denying a motion to quash. If a corporation had books in a warehouse which were subpoenaed the subpoena would require it to get the books out of the warehouse. Sometimes,

[6] To the extent the court's order called for production of materials other than "books of account, minute books, and the list of members," *supra*, pp. 2–3, no action by or before Kenya officials was required.

as where the individual involved is not the sole or actual custodian of the records, considerable efforts may be necessary in order to achieve good faith compliance. See, *e.g.*, *United States* v. *Fleischman*, 339 U.S. 349, where the Court held that the subpoenaed members of an executive board of an association, who had power acting ex officio to direct release of the subpoenaed records by another officer in whose custody they were, were required to meet and issue such an order.[7] The fact that efforts to obtain demanded records must be made on foreign rather than domestic soil is hardly a viable basis for distinguishing in terms of appealability among the two situations. Nor, assuming the court intended to rely thereon, is the assertion that the records as to which no foreign permission was necessary weigh 2,000 pounds rather than a lesser amount. Both the government and the court, faced with a claim of hardship, offered to minimize inconvenience by arranging for inspection in Kenya—an offer consistently rejected by respondent.[8]

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[7] *Fleischman* did not involve a grand jury subpoena and no question was involved as to the appealability of a denial of a motion to quash. We merely use the example as illustrative of a situation which could well arise in the present context and as to which, we submit, the district court's order refusing to quash would not be appealable merely because a more than ordinary degree of affirmative action was required for compliance.

[8] While our chief concern as a matter of general application is the question of appealability, the court below was, we submit, clearly in error in holding the subpoena vague or oppressive. The companies involved had been in existence only since 1959, so that there was no vagueness as to the time period involved. As to the records which, under Kenya laws, could not be transported without permission, the direction to seek permission and, if denied, to permit inspection by United States agents in

Here, then, as in the case of any subpoena or other order in aid of a grand jury's investigations, "[e]very consideration relating to piecemeal litigation and delay of Grand Jury proceedings" fully applies. *Lampman* v. *United States District Court*, 418 F. 2d 215, 217 (C.A. 9). Here, as there, the person subject to the order has an adequate remedy through a defense to proceedings against him for contempt in the event of his noncompliance, and appeal from any conviction or order of civil commitment. Yet, simply by labelling the district court's order a "mandatory injunction," the Ninth Circuit has found its way around the clear mandate of this Court's cases that criminal processes are not to be delayed by interlocutory appeals. Such reasoning, depending as it does on uncertain issues of characterization and degree,[9] simply invites appeals, attendant stays, and with them the delays and disruption which the *Cobbledick* rule properly seeks to prevent.

2. Respondent may argue that the investigative

Kenya was clear. Even if the government had authority to proceed by letters rogatory—a point which has never been decided—it would be preferable not to invoke the aid of a foreign court if, as here, that can be avoided. Cf. 28 U.S.C. 1783. And, since the grand jury was merely seeking to investigate possible violations, letters rogatory would not be feasible.

[9] The court of appeals seeks to distinguish its earlier holding in *Lampman*, *supra*, on the basis that the order in that case "cannot be fairly compared in breadth, reach or overseas effect, to the one that is now before us." Such distinctions are easily asserted, yet will require careful judicial attention to determine on appeal if appeals are permitted. Since they do not create a clean or readily identifiable class of cases as to which appeals will be allowed, they invite litigation of the issue, and attendant stays, in an especially wide class of cases.

process in this case was not actually disrupted by the appeal, for here the court of appeals refused to stay the enforcement of the subpoena and orders or grant other extraordinary relief pending appeal. It takes little imagination, however, to foresee the disruption which may occur if the decision is permitted to stand. If such orders are appealable, stays will regularly be sought and obtained. Many may appeal who, if put to the test of risking citation for contempt, would acknowledge the correctness of an enforcement order or subpoena by producing the materials commanded; appeals may be used *simply* as an instrument of delay. Given the short life of the grand jury, relative to the life expectancy of an appeal (here, almost two years in the court of appeals alone), it will often be possible to frustrate the demand for information entirely. It will not do to say here, any more than it would have in *Cobbledick,* that the absence of interim relief makes the allowance of an appeal harmless; among other considerations, even if interim relief is denied, the pendency of an appeal as to the validity of the district court's action on a subpoena may substantially diminish the fear that noncompliance will result in punishment.

These effects are all the more striking considering that only a fraction of the information demanded in this case was subject to that part of the order requiring any application to Kenya officials. The court of appeals nonetheless entertained the appeal as to all the subpoenaed information. By the same reasoning,

any order in aid of a subpoena which can be labeled as "injunction," even if it affects only a small part of the information sought, would permit appeal and consequent interference with the investigative process as to the whole.

3. The Second Circuit's decision in *In re Grand Jury Investigation of Violations,* 318 F. 2d 533, 536, petition for a writ of certiorari dismissed, 375 U.S. 802, explicitly held that an order issued in connection with a motion to quash a grand jury subpoena could *not* be deemed an appealable injunction under 28 U.S.C. 1292 (a)(1). "The Supreme Court scarcely intended that the important policy pronouncements in Cobbledick and Di Bella could be side-stepped by baptizing a motion to quash as one to enjoin the prosecutor from enforcing a subpoena, or a motion to suppress as one for an injunction restraining the use of evidence and mandating its return; yet such a description would be quite as valid as that * * * [put] forth here." The Second Circuit's holding that that section is inapplicable to criminal proceedings had been confirmed by this Court's statement in *DiBella* v. *United States:* "Every statutory exception [to the rule of finality] is addressed either in terms or by necessary operation solely to civil actions." 369 U.S. at 126. See also *Miller* v. *United States,* 403 F. 2d 77, 78–79 (C.A. 2); *In re Buckey,* 395 F. 2d 385 (C.A. 6); and cf. *Lampman* v. *United States District Court, supra.* That the subpoena here related to records kept outside the United States does not affect the statutory issue, and these

holdings are thus in square conflict with the holding here.[10]

CONCLUSION

It is therefore respectfully submitted that certiorari should be granted.

ERWIN N. GRISWOLD,
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WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

SEPTEMBER 1970.

[10] Even if the decision in this case were confined to grand jury subpoenas of records kept outside the United States, the international nature of much modern day crime necessitates many similar grand jury investigations; the obstacles to those investigations here threatened are themselves of sufficient importance to warrant consideration of the problem by this Court.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 23,343

IN THE MATTER OF THE GRAND JURY SUBPOENA DUCES TECUM OF RAYMOND J. RYAN, APPELLANT

[May 19, 1970]

Appeal from an Order of the United States District Court for the Central District of California

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Before JERTBERG, MERRILL, and ELY, Circuit Judges

PER CURIAM:

This appeal is from an Order of the District Court denying appellant's motion to quash a subpoena duces tecum, ordering him to produce most of the documents called for by the subpoena and requiring affirmative action in relation to other documents. Ryan presents several important contentions in this court, including persuasive arguments grounded in constitutional law. We have concluded that we need not resolve all of these issues, having finally become convinced that the Order is vague and overly broad.

Ryan, an American citizen, has been under investigation for tax evasion for several years. The aspect of the investigation with which we are dealing concerns several African businesses of which Ryan is apparently the principal shareholder. He was subpoenaed by the Grand Jury of the Central District of California and ordered to bring with him "all books, records, papers, and documents" pertaining

to five different companies, all located in Kenya. Ryan moved to quash the subpoena on the grounds, among others, that it was overly broad, that it was served improperly, and that full compliance with it would require him to violate Kenya law. The District Court denied the motion to quash and entered the Order from which Ryan appeals.

The Government contends that we have no jurisdiction to entertain the appeal, arguing that the Order is nothing more than an interlocutory order in a criminal proceeding. Several cases are cited in support of this contention. *Cobbledick* v. *United States,* 309 U.S. 328, 84 L. Ed. 783, 60 Sup. Ct. 540 (1940); *In re Grand Jury Investigation,* 318 F. 2d 533 (2d Cir. 1963); *In re Buckey,* 395 F. 2d 385 (6th Cir. 1968). In none of the cases cited, however, had the District Court ordered anything other than compliance with the subpoena. In contrast, the District Court here modified the subpoena with respect to certain documents and directed the appellant to undertake steps in a foreign country to have those documents released by other persons for transportation to this country or for inspection in Kenya by United States agents. In directing that affirmative action be taken in another country, the District Court did more than deny a motion to quash; it in effect granted a mandatory injunction which, given full effect, would require action by officials of the Kenyan Government. *See International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.,* 389 U.S. 64, 19 L. Ed. 2d 236, 88 Sup. Ct. 201 (1968). We therefore, conclude, in the particular circumstances of this case, that we should hold the Order to be appealable under 28 U.S.C. § 1292(a)(1). *See Continental Oil Co.* v. *United States,* 330 F. 2d 347 (9th Cir. 1964).

Cf. Lampman v. *United States Dist. Ct.*, 418 F. 2d 215 (9th Cir. 1969).[1]

As an injunction, the Order is defective in not stating with sufficient particularity what Ryan was expected to do. Moreover, it is oppressive in scope, it being said without contradiction that Ryan's compliance would require him to transport 2000 pounds of records at his own expense from Kenya. The challenged Order incorporated by reference the subpoena, which had called for all records of the five businesses "including but not limited to checkbooks, books of accounting, disbursement journals, and any and all correspondence relating to these five entities, as well as records, books, papers, documents, and correspondence relating to the application of the currency control regulations and the foreign investments protection act of Kenya to these five" companies. The Government conceded that the subpoena itself was overly broad, but the District Court did not undertake to clarify it or to limit it, except to remove only a few documents from its attempted operation. As to those excepted documents, the Order required affirmative action on the part of Ryan that, arguably, would require him to violate the law of Kenya. Finally, we note that the need for the subpoena, or an injunction, could have been obviated by the use of letters rogatory. The District Court refused to require this approach because of information presented to the court *in camera* and not disclosed to Ryan or his counsel. This information purportedly related to Ryan's improper influence upon the Attorney Gen-

[1] In *Lampman*, the sole challenge to the subpoena was based on action allegedly conflicting with Internal Revenue Service administrative procedures. While we held the Order in *Lampman* was not appealable, that Order cannot be fairly compared, in breadth, reach, or overseas effect, to the one that is now before us.

eral of Kenya. On the record before us, we cannot accept the insinuation that the authorities of a friendly foreign power are subject to corruption. We were informed on oral argument that letters rogatory are now being pursued by the Government, and we have no reason to doubt that the Kenyan Government and its officials will respond in a manner consistent with their jurisprudential heritage.

Reversed.

APPENDIX B

JUDGMENT

United States Court of Appeals
FOR THE NINTH CIRCUIT

IN THE MATTER OF THE GRAND JURY SUBPOENA DUCES TECUM OF RAYMOND J. RYAN,

Appellant.

No. 23343

(D.C. Misc. 1926)

APPEAL from the United States District Court for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

A true copy
ATTEST: [illegible]
Clerk, U. S. Court of Appeals
By
Raymond H. Hackett
Deputy

Filed and entered May 19, 1970

APPENDIX C

United States Court of Appeals for the Ninth Circuit

No. 23,343

IN THE MATTER OF THE GRAND JURY SUBPOENA OF RAYMOND J. RYAN, APPELLANT

Before JERTBERG, MERRILL, and ELY, Circuit Judges

ORDER

The majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Merrill would grant rehearing, but before the panel only.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

_____ _____,

_____ _____,

United States Circuit Judges.

APPENDIX D

District Court Order of July 25, 1968

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Misc. No. 1926

Court's Order

IN THE MATTER OF THE GRAND JURY SUBPOENA DUCES TECUM OF THE WITNESS, RAYMOND J. RYAN

The witness Raymond J. Ryan was served with a grand jury subpoena on March 5, 1968, requiring his appearance before the grand jury on April 15, 1968, and the production of various corporate documents.

Pursuant to motion to quash the subpoena duces tecum filed by the said witness his grand jury appearance was ordered continued to a future date.

Hearings on the motion to quash were held, and the Court finds that the petitioner Raymond J. Ryan at times before and after commencement of the investigation by the Treasury Department and Department of Justice has had control of the records, papers, and documents referred to by the subpoena duces tecum which pertain to the operation of Ryan Investment, Ltd., of Nairobi, Kenya, and Mawingo, Ltd., of Nanyuki and Nairobi, Kenya, doing business as The Mount Kenya Safari Club of Kenya.

WHEREFORE, IT IS ORDERED THAT:

I. The motion of Raymond J. Ryan to quash the subpoena duces tecum is denied.

II. Raymond J. Ryan will produce, with the exception of the books of account, minute books and the list of members, before the Federal grand jury at Los Angeles, California, on September 11, 1968, the books, records, papers and documents of Ryan Investment, Ltd., of Nairobi, Kenya, and Mawingo, Ltd., of Nanyuki and Nairobi, Kenya, doing business as The Mount Kenya Safari Club, referred to in the April 15, 1968, subpoena duces tecum served on Raymond J. Ryan.

III. Raymond J. Ryan shall forthwith make application to the Registrar of Companies in Kenya to release the books of account, minute books, and list of members so that Raymond J. Ryan may produce these books, records, papers and documents at the Federal grand jury held at Los Angeles, California, on September 11, 1968, provided that if Raymond J. Ryan is unable to secure the consent of the Registrar of Companies of Kenya, then Raymond J. Ryan will make available to agents of the United States Department of Justice and/or the United States Department of the Treasury the books of account, minute books, and list of members, of Ryan Investment, Ltd., and Mawingo, Ltd., and these agents may inspect and make copies of these books and records.

/s/ MANUEL L. REAL
Manuel L. Real
United States District Judge

APPENDIX E

In the United States Court of Appeals for the Ninth Circuit

No. 23144

RAYMOND JOHN RYAN, PETITIONER,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, JUDGE MANUEL L. REAL, RESPONDENT

Before BARNES, HAMLEY and MERRILL, *Circuit Judges*

ORDER

Raymond John Ryan, having moved herein for an order in the nature of extraordinary relief prohibiting and restraining The Honorable Manuel L. Real, District Judge, United States District Court for the Central District of California, from enforcing an order entered July 25, 1968, commanding Ryan to comply with a grand jury subpoena duces tecum, as amended, requiring Ryan to produce certain records before the grand jury in Los Angeles on September 11, 1968, and having moved herein for an immediate stay on the grand jury subpoena and the implementing district court order pending a determination of the motion for an order in the nature of extraordinary relief; and

It appearing to the Court, upon the showing made in the papers filed and oral argument had on August 22, 1968, that exceptional circumstances do not exist warranting this Court in entertaining, on the merits, the motion for an order in the nature of extraordinary relief: Now, therefore, it is

Ordered, That, on this limited ground, and without reaching the merits, the motion for an order in the nature of extraordinary relief is denied; and it is further

Ordered, That because of the delay unavoidably occasioned in seeking relief in this Court, the time for compliance with the subpoena duces tecum is stayed from September 11, 1968 to September 23, 1968, unless the district court shall set a later date for such compliance; and it is further

Ordered, That, this Court being of the view that the Supreme Court of the United States would not ordinarily grant a writ of certiorari to this Court to review an order of this kind, Ryan's motion, made at the time of the oral argument, to grant a stay for thirty days to enable him to petition for a writ of certiorari is denied.

Stanley N. Barnes,
Frederick G. Hamley,
Charles M. Merrill,
United States Circuit Judges.

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